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No. 01-1726

Supreme Court, U.S.
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In The
Supreme Court of the United States

MIGNON MOORE,

Petitioner,

v.

TRAVIS PRUITT & ASSOCIATES, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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THE COURT OF APPEALS DECISION MEANS WHAT IT SAYS

(1) In the court of appeals, respondent asked for and got a determination by the appellate court that the harassment in this case did not create a hostile environment.

> The district court properly *determined* that Taylor's conduct did not create an objectively hostile work environment. Although Taylor's alleged statements and conduct were inappropriate, his acts fall short of the level of either severe or pervasive conduct sufficient to alter the terms or conditions of Moore's employment.

(Pet. App. 8a) (Emphasis added). An appellate finding of fact regarding whether there was a hostile environment would undeniably conflict with the decisions of this Court and of several other circuits. (Petition 13-16).

Making the best of a bad situation, respondent insists that what the court of appeals actually *meant* was that no reasonable jury could determine that the environment was hostile. The opinion of the Eleventh Circuit, respondent argues, is merely "poorly drafted" (Br. Opp. 5); the appellate court never bothered to mention the reasonable jury standard because that would have been to "state the obvious." (*Id.*). And there could be no inter-circuit conflict, according to respondent, because every judge knows that appellate courts cannot make their own findings regarding whether or not there was a hostile environment in a particular case. (Br. Opp. 4-6).

Respondent's insistence that the decision of the court of appeals is merely a slip of the judicial pen is belied by the fact that there are literally dozens of similarly worded opinions in the Fourth, Sixth, Eighth, Ninth and Eleventh

Circuits. (Petition 9-12). Every appellate judge understands full well the difference between making his or her own determination on appeal, and merely resolving whether a reasonable jury might have arrived at a particular result. It is not to be believed that the authors of dozens of appellate opinions have repeatedly used phrases like "we find" when they *meant* instead to say "any reasonable jury would find." Nor can it possibly be sheer coincidence that appellate courts which carefully and expressly make this distinction in all other instances have repeatedly failed to do so in dismissing sexual harassment claims.

Respondent does not point to passages in these dozens of cases themselves which call into question their evident literal meaning. Instead, respondent observes that there are in these same circuits *other* decisions in harassment cases which do indeed apply a reasonable jury standard. (Br. Opp. 6-8). But this merely highlights a pattern of decision-making which is even more troubling. As a general matter,[1] when panels in these circuits rule for the defendant, they make their own determination that the environment was not hostile; but when the decision is in favor of the plaintiff, the courts merely hold that a reasonable jury could find the environment was hostile. With the exception of one Ninth Circuit decision, *all* of the decisions cited by respondent in which a "reasonable jury" standard was applied are decisions in favor of the plaintiff.

This asymmetrical practice has an obvious and indefensible result. Appellate courts that will with alacrity

[1] The pattern in the more pro-plaintiff Ninth Circuit is less clear.

make their own determination that an environment *was not* hostile (and thus award defendants summary judgment or judgment as a matter of law) refrain from making determinations that a work environment *was* hostile (a determination which would require summary judgment for the plaintiff). In these circuits, decisions in harassment cases granting summary judgment to defendants are legion; decisions granting summary judgment to plaintiffs are unknown. Prevailing defendants alone can obtain summary judgment or judgment as a matter of law; prevailing plaintiffs can win only a right to trial, at which the defendant will be accorded a chance to show the environment was not hostile. Thus there is in these circuits a growing body of caselaw delineating what types of harassment *do not* create a hostile environment, but no similar body of caselaw delineating what types of harassment *do* do so.

Respondent emphasizes that in this case the *district* court did refer to the reasonable jury standard (Br. Opp. 5), and asserts that the appellate court in turn agreed with the "result." (Br. Opp. 6). But at this juncture the question is what legal standard the *appellate* court applied. The Eleventh Circuit decision makes no reference to the reasonable jury standard; indeed, the word "jury" is nowhere to be found in its opinion.[2] The fact that in this

[2] The Eleventh Circuit held that Moore had not adduced sufficient evidence "to support a *finding*" that the harassment created a hostile environment. (Pet. App. 9a) (Emphasis added). This passage refers to whether the evidence would warrant a judicial determination that there was a hostile work environment. "Findings" are made by courts; juries return verdicts. *Compare* Fed. Rule Civ. Pro. 49 *with* Fed. Rule Civ. Pro. 50.

regard the appellate opinion utilizes a standard different than that applied by the district court confirms that the Eleventh Circuit meant what it said – the panel itself arrived at its own conclusion that the harassment did not create a hostile environment, and regarded its conclusion as dispositive.

(2) In disavowing the literal meaning of the Eleventh Circuit's finding regarding the harassment claim, respondent insists that the court of appeals assuredly knew that judges cannot make findings regarding disputed facts in a case in which a jury has been requested. This Court, it reasons, must therefore conclusively presume that the Eleventh Circuit did not intend to make or uphold any such obviously impermissible factual finding. On the other hand, in disavowing the literal meaning of the appellate decision regarding the retaliation claim, respondent takes precisely the opposite approach. The Eleventh Circuit, respondent insists, must be presumed to have been making or upholding a finding of fact that the harassment which Moore resisted was not *sexual* harassment. (Br. Opp. 10-11).

The Eleventh Circuit's rejection of the retaliation claim is phrased as a straightforward legal issue.

> Because Moore's gesture and statement to Taylor was not a report of an unlawful employment practice, this contact was not protected expression under Title VII. *See* 42 U.S.C. § 2000e-3(1); *see also Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F. 3d 501, 507 (11th Cir. 2000) (stating that statutorily protected expression includes *filing complaints with the EEOC and complaining to superiors* about sexual harassment).

(Pet. App. 6a) (Emphasis added). When Moore told Taylor to stop harassing her, her objection was not a "complaint" of harassment, and thus was not protected by section 704(a) of Title VII.

Respondent insists, however, that what the court of appeals must actually have intended was to conclude that Taylor's harassment was not sexual in nature, and thus not the type of harassment covered by Title VII at all. (Br. Opp. 11). Respondent does not even attempt to point to a passage in the Eleventh Circuit opinion which could possibly have this meaning. Indeed, there is nothing in the opinion which suggests the court of appeals was even aware that such a factual contention had been made. Respondent offers no explanation of *why* Taylor would have been harassing Moore other than as a continuation of the prior, clearly sexual harassment.

Respondent asks this Court to infer reliance on such a factual finding – and to disregard the actual language of the opinion – because the appellate opinion states that Moore established a prima facie case of retaliation. Such a prima facie case could not exist, respondent reasons, if Moore's actions were not protected activity; *ergo*, the court of appeals must have believed that resisting Taylor's harassment constituted protected activity under section 704(a). Unstated appellate reliance on a never-mentioned factual finding, respondent suggests, is the only possible explanation for the action of the Eleventh Circuit in dismissing Moore's retaliation claim. (Br. Opp. 10-11).

The actual holding of an appellate decision cannot be disregarded on the basis of such speculative reasoning. Nothing in the decision itself suggests that the Eleventh Circuit thought that its reference to the existence of a

prima facie case somehow precluded that court from addressing and deciding whether Moore's actions were outside the protections of Title VII. In concluding that Moore's actions were unprotected, what the court of appeals actually cites is not any factual finding by the district court, but legal precedent which purportedly limits the statutory protections to "complaints". (Pet. App. 6a).

Respondent acknowledges that the several circuits have held that the act of resisting sexual or other harassment is protected activity under section 704(a). All of these cases, respondent asserts, involve harassment by a supervisor. (Br. Opp. 13-14). That is not correct.[3] More importantly, it is simply irrelevant. Respondent offers no explanation as to why section 704(a) would protect a plaintiff who resisted sexual harassment by a supervisor, but would not protect a plaintiff who took the identical action in resisting the very same harassment by a co-worker. No basis for such a distinction is readily imaginable.

[3] *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999) (plaintiff fired for pushing co-worker who was harassing her); *DeGrace v. Rumsfeld*, 614 F.2d 796, 804 (1st Cir. 1980) (plaintiff fired for staying away from job because of threats by "fellow employees").

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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